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No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1962

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38–44) is not yet reported. Opinions of the district court (R. 22a–25a, 176a–186a; Pet. App. 23–37) are reported at 191 F. Supp. 683 and 197 F. Supp. 295.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962 (Pet. App. 45). A petition for rehearing was denied on January 16, 1963 (Pet. App. 46). The petition for a writ of certiorari was filed on February 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents abandoned by petitioner in a trash receptacle near his apartment and delivered by a trash collector to government agents were properly admitted in evidence.

2. Whether the court properly refused a request by petitioner, charged with the felony of attempted evasion of wagering taxes, for an instruction that the jury might find him guilty of the lesser included misdemeanor of wilful failure to file a return or to pay the taxes.

3. Whether the evidence was sufficient to support petitioner's conviction for wilfully attempting to evade wagering taxes.

4. Whether consecutive sentences could be imposed for separate monthly attempts to evade the payment of wagering taxes, which are due monthly.

STATUTES, REGULATIONS AND RULE INVOLVED

Relevant portions of 26 U.S.C. 4401, 4403, 6001, 6071, 7201 and 7203; 26 C.F.R. (1961 ed.) 44.4403–1, 44.6001–1, 44.6011(a)–1 and 44.6071–1; and Rule 31 of the Federal Rules of Criminal Procedure are set forth in Appendix A of the petition (Pet. 17–26).

STATEMENT

Petitioner and others were charged in the United States District Court for the Eastern District of Pennsylvania under a seven-count indictment with violations of 26 U.S.C. 7201, for wilfully attempting to evade wagering excise taxes due under 26 U.S.C. 4401 for the months of September 1959 through

March 1960, inclusive (R. 5a–12a). The court ordered petitioner's acquittal on counts 1 and 2 (R. 169a), and the jury found him guilty on counts 3 through 7, inclusive (R. 166a). Petitioner was sentenced to imprisonment for a period of one year on each of counts 3, 4, 5 and 6, to run consecutively, and on count 7 imposition of sentence was suspended and petitioner was placed on probation for five years, to begin at the time of his release under the sentence imposed on count 6. Fines were imposed in the amount of $2,500 on count 3, $5,000 on count 4, $7,500 on count 5, $10,000 on count 6, and $10,000 on count 7 (R. 188a). On appeal the conviction was affirmed (Pet. App. 45).

1. Prior to trial petitioner filed a motion for suppression of evidence, claiming that certain gambling paraphernalia had been illegally seized from a trash receptacle near his apartment (R. 14a, 16a–18a). The district court after a hearing denied this motion (R. 21a). A renewed motion to suppress this evidence was denied at the trial (R. 54a–55a, 173a).

Mr. Noll, the superintendent of the four-family apartment in which petitioner was a tenant, testified that the tenants were required to dispose of their trash in the receptacle provided them. All four tenants and the superintendent used the same trash receptacle, which was about four feet beyond the building line near some bushes and a lattice-work trellis (R. 43a–46a, 48a–49a). Noll had a verbal contract with a Mr. Damore for the removal of the trash three days a week. No limitations were imposed

upon Damore as to disposal of the trash after he took it away (R. 45a).

Damore testified that he would customarily deliver the trash to a dump where it was burned (R. 36a, 40a). At the request of government agents, Damore turned over to them the trash from the house in which petitioner lived for the period from November 18, 1959, to March 29, 1960 (R. 61b, 36a–39a). The agents pieced together adding machine tapes and papers considered pertinent to their investigation of petitioner (Gov. Exhibits G–12A and G–12B). Petitioner's trash was readily distinguishable from that of the other tenants, since it was found in a bag or box with newspapers, napkins and prescription bottles bearing his name (R. 63b, 52a–53a).

2. At the trial the evidence showed that on numerous dates in August and September 1959 (R. 5b–18b), December 1959 (39b–41b), and February and March 1960 (R. 24b–33b, 41b–45b), a government agent on surveillance observed some of the defendants meeting together in the afternoon at the same place, passing brown envelopes to each other, and engaging in similar activities usual in a numbers operation. On March 3, 1960, agent Gentile asked petitioner if he was in the business of accepting wagers, and petitioner made no reply. The agent told petitioner about the legal requirements for a $50 occupational stamp tax, the filing of monthly returns as to gross wagers, and the 10 percent tax due thereon (R. 100a–101a).

On March 25, 1960, at a farmhouse near Neversink Road where a number of persons (not including pe-

titioner) had been seen, agents seized three adding machines, numbers slips, $4,000 in cash, a gun and gambling paraphernalia (R. 33b–36b). One item seized in the raid was a numbers bank summary for March 1960 (Gov. Ex. 7–D; R. 176b), which had accounts for each major number writer by coded symbol. The first column showed the gross wagers accepted by the writer. The second column indicated 65 percent of the first column, being the net cash to the bank after deduction of the writer's 35 percent commission. The third column listed the "hits" upon which the bank would have to pay out. All of these figures, together with the expenses incurred by the bank, were recorded on the bank summary sheet (Gov. Ex. 7–D; R. 51b–54b).

Testimony of agent Lynn included a line-by-line comparison and reconstruction analysis of figures reflected on the bank summary statement (Gov. Ex. 7–D) with figures and totals appearing on the tapes and written memoranda found in petitioner's trash (Gov. Ex. 12–A and 12–B). Handwritten memoranda found in the trash were shown, by expert testimony, to be in petitioner's handwriting (R. 89a–94a, 28a–30a). In numerous instances the amounts appearing on the tapes from petitioner's trash corresponded exactly with the amounts on the bank summary statement (e.g., R. 73b–74b, 78b–81b). Agent Lynn in his analysis testified as to the net profit of the numbers operation for periods in November and December 1959 (R. 133b–146b), January 1960 (R. 118b–132b), February 1960 (R. 113b–118b) and March 1960 (R. 67b–97b). The gross wagers for the months

in issue varied from $86,000 to $111,000 per month (R. 171b–172b).

ARGUMENT

1. There was no violation of petitioner's rights under the Fourth Amendment (see Pet. 8–10). The trash receptacle was located in an area beyond the second floor apartment premises which petitioner occupied. Petitioner's only interest in the trash receptacle was his right to use it in common with the other persons in the house. There was no interference with petitioner's privacy and no unauthorized search of the apartment where he lived. In these circumstances the court of appeals properly held that petitioner did not have standing to challenge the search and seizure. The instant case is not like *Jones* v. *United States*, 362 U.S. 257, and *United States* v. *Jeffers*, 342 U.S. 48, in each of which the accused had a right to be present in the apartment and hotel room, respectively, where the search occurred.

But even if it be assumed that petitioner did have requisite standing, there was no invasion of petitioner's rights since he abandoned the property in question when he placed it in the trash receptacle. Cf. *Abel* v. *United States*, 362 U.S. 217, 241; *Hester* v. *United States*, 265 U.S. 57, 58. Neither petitioner nor the apartment superintendent had any interest in what the trash collector did with the trash so long as he disposed of it. Damore acted properly in turning over the trash, and the agents acted properly in examining it.

2. The district court properly refused petitioner's request No. 7 for a charge that the jury could con-

vict petitioner of a lesser included offense under 26 U.S.C. 7203 (R. 158a, 171a).[1]

The crime defined in 26 U.S.C. 7203 of wilful failure to file or to pay a tax is not a lesser included offense under 26 U.S.C. 7201, punishing an attempt to evade or defeat the tax. A lesser included offense is one where all elements of the lesser offense must necessarily enter into the greater, and only some additional element of aggravation need be shown to prove the greater. 1 Wharton, *Criminal Law* (12th ed. 1932), sec. 33; *Ekberg* v. *United States*, 167 F. 2d 380, 389 (C.A. 1). See *Berra* v. *United States*, 351 U.S. 131, 134. Proof to establish wilful evasion of a tax does not require proof of wilful failure to file. Hence, even though in a particular instance the means of evasion may include failure to file, the *offense* of wilful failure to file is not included in the *offense* of tax evasion. In *Chaifetz* v. *United States*, 366 U.S. 209, this Court reversed, with directions to vacate, a conviction for the offense of wilfully failing to supply information required by law, which had been submitted to the jury as a lesser included offense of the crime of attempted evasion. In that case one of the means of evasion was failure to supply information,

[1] This rejected charge read in pertinent part that "* * * if you find * * * that [petitioner] was required to file a return and pay the excise taxes on wagers, and if, you find * * * that [petitioner] willfully failed to file such returns and to pay such taxes, but you further find that [petitioner] did not willfully attempt to evade the excise taxes, you will find [petitioner] not guilty of the charge contained in the indictment, but guilty of the lesser offense included in the offense charged in the indictment, that is, the offense of willfully failing to make returns and to pay the excise taxes" (R. 171a).

but the ruling of this Court establishes that the offense as such is not included in the offense of tax evasion. Similiarly here, the offense of failure to file as such is not a lesser included offense in the crime of tax evasion.

3. Petitioner contends that the evidence was insufficient to support his conviction in that the prosecution failed to show that he had a proprietary interest in the wagering lottery (Pet. 12–13). The issue was submitted to the jury under a charge that petitioner should be convicted only if the jury found that he had conducted the lottery (R. 141a–142a). The court also instructed as follows (R. 147a):

> The word "conduct," as used in the statute, means to carry on, or to manage, or to have the direction of, coupled with a proprietary interest, that is with an ownership interest. That doesn't mean necessarily the sole and exclusive owner, but an ownership interest in some part, a proprietary interest, as defendant [*sic*] counsel himself used the word in his argument, an ownership interest coupled with the carrying on or the having the direction of the lottery.

The jury's finding that petitioner had conducted the lottery was clearly warranted from the evidence showing daily records of wagers, code numbers of writers, net cash for the bank, day-to-day expenses, and lottery "hits". These documents constituted the kind of information which would be needed by the banker or proprietor of a numbers operation. Moreover, a number of the notations and calculations on documents taken from petitioner's trash were in his own hand-

writing. Then too, the fact that petitioner had ultimate dominion over, and possession of the daily record tapes which he disposed of in the trash, also tended to show that he was the proprietor of the lottery.

4. The court had authority to impose consecutive sentences for each month of attempted tax evasion (see Pet. 13-15). The normal unit for tax prosecutions is the period when the tax is due—yearly for income taxes, quarterly for such taxes as social security and withholding taxes, monthly for such taxes as admissions tax or wagering tax. See *United States v. H.J.K. Theatre Corp.*, 236 F. 2d 502 (C.A. 2), certiorari denied, 352 U.S. 969, where the monthly unit was used as to admissions taxes, and *United States* v. *Shaffer*, 291 F. 2d 689 (C.A. 7), certiorari denied, 368 U.S. 915, where separate sentences for monthly violations of 26 U.S.C. 7201 were upheld.

The distinction advanced between wagering and income taxes, that monthly wagering tax returns are required by regulations and yearly income tax returns by statute, is not of controlling importance and does not destroy the analogy between the two. In both instances a separate offense is involved for the particular time period of delinquency.[2]

The instant case is analogous to *United States* v. *Guterma*, 281 F. 2d 742, 752 (C.A. 2), certiorari denied, 364 U.S. 871, holding that separate fines could be imposed as punishment on substantive counts

[2] There is nothing in *Bohn* v. *United States*, 260 F. 2d 773 (C.A. 8), certiorari denied, 358 U.S. 931, to indicate that consecutive sentences could not be imposed in the instant case, even though the counts there for violations of 26 U.S.C. 7201 were for periods of more than a month.

for each monthly failure to file with the Securities and Exchange Commission insider's reports required by statute. The court rejected the argument that the offenses sprang from a single impulse, so as to make *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, applicable. See also *Swepston* v. *United States*, 289 F. 2d 166, 168–169 (C.A. 8), certiorari denied, 369 U.S. 812 (consecutive sentences valid for filing separate false claims for income tax refunds, though defendant may have had but one overall scheme to defraud); *United States* v. *Alaimo*, 297 F. 2d 604, 605–606 (C.A. 3), certiorari denied, 369 U.S. 817 (each unlawful payment a separate offense under the Labor Management Relations Act).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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